

SERVICE DATE — JUNE 23, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1256<sup>1</sup>

BOSTON AND MAINE CORPORATION & SPRINGFIELD TERMINAL RAILWAY  
COMPANY—ADVERSE DISCONTINUANCE OF OPERATING AUTHORITY—  
MILFORD-BENNINGTON RAILROAD COMPANY, INC.

Digest:<sup>2</sup> This decision exempts and waives certain requirements that normally must be satisfied when filing for discontinuance and abandonment authority, but are either unnecessary here or would be difficult or impossible for the Boston and Maine Corporation and the Springfield Terminal Railway Company to comply with when it files an application for adverse discontinuance.

Decided: June 21, 2017

In a petition filed on March 17, 2017, the Boston and Maine Corporation and the Springfield Terminal Railway Company (collectively, Pan Am) seek waiver of certain Board regulations and exemptions from related statutory provisions regarding the filing of a third-party, or “adverse,” application for discontinuance. Pan Am intends to ask the Board to terminate the Milford-Bennington Railroad Company, Inc.’s (MBR) operating authority over a Pan Am rail line in southern New Hampshire.

On April 6, 2017, MBR filed a reply in partial opposition to Pan Am’s waiver and exemption requests.<sup>3</sup>

As discussed below, the Board will grant in part and deny in part Pan Am’s petition for waivers and exemptions.

---

<sup>1</sup> This petition originally was filed as Docket No. AB 32 (Sub-No. 108X) but has been re-docketed as AB 1256 to conform with the Board’s docketing protocol for adverse discontinuance proceedings.

<sup>2</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>3</sup> On May 22, May 23, and May 30, 2017, the Board received letters from Monadnock Paper Mills, Inc.; the Town of Wilton, N.H.; and the Town of Milford, N.H.; respectively, opposing Pan Am’s petition for waivers and exemptions.

## BACKGROUND

Pan Am states that it intends to ask the Board to find that the public convenience and necessity permit the adverse discontinuance of the operations by MBR over approximately five miles of rail line on the Hillsborough Branch from milepost 11.00 to milepost 16.36 in southern New Hampshire (the Line).<sup>4</sup> (Pet. 2.) According to Pan Am, MBR has been operating over the Line pursuant to a trackage rights agreement dated June 22, 1992, that expired in 2004.<sup>5</sup> (*Id.* at 3.) Despite the expiration of the agreement, Pan Am contends that MBR continued to operate over the Line and pay Pan Am for operating over the Line until late 2012, when MBR reduced the payment amounts. (*Id.*) According to Pan Am, MBR eventually stopped making any payments. (*Id.*) Pan Am asserts that, upon the Board's approval of its application and MBR's discontinuance of service, Pan Am would take control of all rail operations and be the exclusive operator over the Line. (*Id.*) Pan Am seeks waivers of, and exemptions from, requirements that it argues are inapplicable or irrelevant to the issues in this adverse discontinuance proceeding.

MBR, a Class III rail carrier, states that it has held trackage rights over the Line since 1992 and that it uses those trackage rights to provide rail service to Granite State Concrete Co., Inc. (Granite State) between a quarry facility and a Granite State processing plant. (Reply 1-2.) MBR states that its trackage rights were granted as part of an agreement that resulted in the withdrawal of MBR's feeder line application to acquire the Line and that Pan Am previously made an unsuccessful attempt to terminate MBR's operations over the Line.<sup>6</sup> (*Id.* at 2-3.) MBR states that it will oppose any application to adversely discontinue MBR's trackage rights over the Line and that it opposes some of Pan Am's waiver and exemption requests. (*See id.* at 4-6.)

## DISCUSSION AND CONCLUSIONS

The Board's regulations impose requirements on abandonment and discontinuance applications under 49 C.F.R. pt. 1152 subparts B and C. In appropriate circumstances, however, such as the filing of an adverse abandonment or discontinuance application, the Board may waive inapplicable and unneeded regulations and grant exemptions as appropriate from statutory provisions. See Riverview Trenton R.R.—Adverse Aban.—in Wayne Cty., Mich, AB 1230

---

<sup>4</sup> The Line has been the subject of several proceedings before the Board and the Board's predecessor, the Interstate Commerce Commission. See, e.g., Milford-Bennington R.R.—Trackage Rights Exemption—Boston & Me. Corp., FD 32103 (ICC served Sept. 3, 1993); Granite State Concrete Co. v. Boston & Me. Corp., 7 S.T.B. 834 (2004). For purposes of this proceeding, the Board will include only the most relevant procedural history.

<sup>5</sup> Milford-Bennington R.R.—Trackage Rights Exemption—Boston & Me. Corp., FD 32103 (ICC served July 9, 1992).

<sup>6</sup> Milford-Bennington R.R.—Feeder Line Acquis.—Boston & Me. Corp. Hillsborough Branch, FD 31701 (ICC served July 6, 1992); Milford-Bennington R.R.—Trackage Rights Exemption—Boston & Me. Corp., FD 32103 (ICC served Sept. 3, 1993).

(STB served Apr. 10, 2015); Lackawaxen-Honesdale Shippers Ass'n—Adverse Discontinuance of Operating Auth.—in Wayne & Pike Ctys., Pa., AB 1110 (STB served Jan. 23, 2014).

System Diagram Map. Pan Am requests waiver of 49 C.F.R. §§ 1152.10-14, which governs the filing and amending (and providing notice to the public) of a carrier's system diagram map (SDM), and establishes a two-month waiting period between SDM amendments and a corresponding discontinuance application. (See Pet. 4-5.) In support, Pan Am contends that there is no need for filing an SDM in an application that is intended only to permit a change of operations and not to discontinue service entirely. (*Id.*) Pan Am further seeks an exemption from the corresponding SDM requirement at 49 U.S.C. § 10903(c)(2). (Pet. 6.)

The Board will grant Pan Am's waiver request as to the SDM requirements and, as explained in the exemption analysis below, exempt Pan Am from the requirements of 49 U.S.C. § 10903(c)(2). The SDM requirements are customarily waived in adverse discontinuance proceedings where, as here, the adverse discontinuance is intended to result only in a change of operators. See Lackawaxen, AB 1110, slip op. at 3.

Line Attributes. Pan Am seeks waiver of 49 C.F.R. § 1152.22(c), (d), and (e), which require that discontinuance applications include information regarding the service provided, attributable revenue and cost data, and rural and community impact. (Pet. 5.) Pan Am argues that this data is unnecessary because this adverse discontinuance would result in only a change of operators. (See *id.*) Additionally, Pan Am contends that the revenue and costs data requirements are intended to apply only to carriers that seek to discontinue their own operations because those operations are a burden on interstate commerce. (*Id.*)

MBR opposes Pan Am's request for waiver of 49 C.F.R. § 1152.22(c) (service information) and 49 C.F.R. § 1152.22(e) (rural and community impact information). (Reply 5.) MBR argues that information on transportation alternatives under 49 C.F.R. § 1152.22(e)(3) is important because of the Board's prior revocation of Granite State's commodity class exemption in Granite State. (See Reply 6 (citing Granite State, 7 S.T.B. at 838).)<sup>7</sup> MBR also contends that it is incumbent on Pan Am to address the differences in service between what MBR currently provides and what Pan Am would provide. (See Reply 6.)

The Board will grant Pan Am's request for waiver of 49 C.F.R. § 1152.22(c), (d), and (e). This information is not necessary here because there would only be a change of operators and not a complete discontinuance of service. See Lackawaxen, AB 1110, slip op. at 3.<sup>8</sup> Additionally,

---

<sup>7</sup> In 2004, in Granite State, the Board partially revoked the commodity class exemption to consider a complaint by MBR and Granite State alleging that Pan Am was unreasonably interfering with MBR's ability to carry out its common carrier obligation to serve Granite State. At the conclusion of the proceeding, the Board decided not to reinstate the exemption from regulation for Granite State's shipments of stone, crushed stone, sand, and gravel, thereby subjecting these movements to continued regulation. 7 S.T.B. at 838.

<sup>8</sup> The Board also notes that this type of information is typically not available to an adverse discontinuance applicant. See Hartwell First United Methodist Church—Adverse Aban.  
(continued...)

§ 1152.22(c), which deals with the service provided, does not require Pan Am to address the differences in service between what MBR currently provides and what Pan Am would provide. See 49 C.F.R. § 1152.22(c). Finally, Pan Am is correct that the revenue and cost data requirements are intended to apply only to carriers that seek to discontinue their own operations on the grounds that those operations are a burden on interstate commerce, which Pan Am is not claiming here. See Lackawaxen, AB 1110, slip op. at 3.

Environmental and Historical Impacts. Pan Am requests waiver of the Board's environmental and historic reporting requirements. (Pet. 5-6.) It contends that rail operations would continue following this proposed adverse discontinuance and that adverse discontinuance would not result in significant changes that exceed the thresholds for environmental review in 49 C.F.R. §§ 1105.6-7. (Id. at 5.) MBR does not oppose these requests.

Because this proposed discontinuance would merely substitute operators and would not result in a change in operations that would exceed the thresholds in 49 C.F.R. § 1105.7, it is excepted from the need to prepare environmental documentation under 49 C.F.R. § 1105.6(c)(1)(ii) and the historic report requirements under 49 C.F.R. § 1105.8(b)(1). See Lackawaxen, AB 1110, slip op. at 3. The Board will, therefore, grant Pan Am's request for waiver of the Board's environmental and historic reporting requirements.

Filing, Notice, Posting, and Newspaper Publication. Pan Am seeks partial waiver of the filing and notice requirements of 49 C.F.R. § 1152.20. (Pet. 6.) With respect to the form and timing requirements of the notice of intent under § 1152.20(a)(1) and (b)(1), Pan Am asks that its waiver and exemption petition be permitted to serve as its notice of intent to discontinue service. With respect to the service list requirements of § 1152.20(a)(2), Pan Am asks that it be permitted to serve its waiver and exemption petition only upon the sole shipper on the Line and all connecting rail carriers, if any. (Id.) Finally, with respect to § 1152.20(a)(3) and (a)(4), Pan Am seeks waiver of the posting requirements and newspaper publication requirements, respectively. (Id.)

In addition, Pan Am further seeks an exemption from the requirements at 49 U.S.C. § 10903(a)(3)(B) and (C), which require the notice be (1) posted at each terminal and station on each portion of a railroad line over which all transportation is to be discontinued and (2) published for three consecutive weeks in a newspaper of general circulation in each affected county. (See id. at 6-7.) Pan Am argues that it should be exempted from § 10903(a)(3)(B) and

---

(...continued)

& Discontinuance—Hartwell R.R. & The Great Walton R.R., in Hart Cty., Ga., AB 1242, slip op. at 4 (STB served Aug. 30, 2016) (citing Norfolk S. Ry.—Adverse Aban.—St. Joseph Cty., Ind., AB 290 (Sub-No. 286), slip op. at 5 (STB served Oct. 26, 2006)). See also Bos. & Me. Corp.—Adverse Discontinuance—New Eng. S. R.R., AB 32 (Sub-No. 100), slip op. at 3 (STB served Feb. 12, 2008) (granting a request for waiver of § 1152.22(c), (d), and (e) where the applicant had not provided service for many years and therefore did not possess the information necessary to comply with the requirements of the regulations (though noting that the applicant has the burden to demonstrate why adverse discontinuance should be granted)).

(C) because it is not discontinuing service. (Id.) Additionally, Pan Am contends that § 10903(a)(3)(B) was designed for carriers that, unlike Pan Am, are proposing to voluntarily discontinue their own service over a line. (See id.)

MBR opposes Pan Am's request for waiver of the 49 C.F.R. § 1152.20(a)(4) newspaper publication requirement and exemption from 49 U.S.C. § 10903(a)(3)(C). (Reply 4.) MBR asserts that newspaper publication is not onerous and would ensure that all interested persons and entities are given notice and the opportunity to participate in the proceeding. (See id.) MBR also contends that Pan Am's request for waiver of requirements to file and serve a notice of intent under 49 C.F.R. § 1152.20(a) should be denied because Pan Am's petition does not contain all the procedural and public participation information required by 49 C.F.R. § 1152.21. (Id.) MBR further argues that Pan Am, rather than requesting waiver, should propose modifications to the prescribed notice of intent form in 49 C.F.R. § 1152.21 that account for the unique attributes of an adverse discontinuance, but ensure substantial compliance with the regulatory requirements. (Id. at 5.)

Pan Am's request for waiver of the 49 C.F.R. § 1152.20(a)(1) and (b)(1) requirements is reasonable, and the Board will grant this request. The Board will grant, in part, Pan Am's request for waiver of the 49 C.F.R. § 1152.20(a)(2) service requirements. Specifically, the Board will require Pan Am to serve its notice of intent on MBR, Granite State, the New Hampshire Department of Transportation (to ensure that the appropriate state agency is notified, see, e.g., 49 C.F.R. § 1152.20(a)(2)(iv)), and the other parties of record: Monadnock Paper Mills, Inc., the Town of Wilton, and the Town of Milford. However, to the extent Pan Am might be seeking waiver of any of the labor requirements under § 1152.20(a)(2), it does not provide a basis for why it should be excused from notifying any known railroad employees on the Line that could be adversely affected by the application. Accordingly, Pan Am also will be required to serve a copy of its notice of intent on the U.S. Railroad Retirement Board and the headquarters of all duly certified labor organizations that represent employees on the Line, if any. See 49 C.F.R. § 1152.20(a)(2)(ix) and (xii).<sup>9</sup>

The Board will grant Pan Am's request for waiver of the posting requirements of 49 C.F.R. § 1152.20(a)(3). This request is appropriate, as the posting requirements were designed for carriers proposing to voluntarily discontinue service over their own lines. See Lackawaxen, AB 1110, slip op. at 4. As discussed below, the Board will likewise grant the exemption from § 10903(a)(3)(B).

However, the Board will deny Pan Am's request for waiver of 49 C.F.R. § 1152.20(a)(4) and exemption from 49 U.S.C. § 10903(a)(3)(C), which require newspaper publication of a notice of intent to discontinue for three consecutive weeks. Newspaper publication is not onerous and ensures that all persons and entities with an interest in the line are given notice and the opportunity to participate. See Lackawaxen, AB 1110, slip op. at 4 (citing Cerro Gordo,

---

<sup>9</sup> Additionally, the Board notes that Pan Am does not ask for a waiver of the filing and service requirements for the discontinuance application at 49 C.F.R. § 1152.24. (See Pet. 6.) Therefore, Pan Am must comply with § 1152.24 in its entirety when filing its application.

Cty., Iowa—Adverse Discontinuance—Iowa Traction R.R., AB 1063, slip op. at 5 (STB served Mar. 16, 2011)). Here, requiring three weeks of newspaper publication will not unduly delay this proceeding and will better ensure that the public is aware of the upcoming application.

Offers of Financial Assistance. Pan Am requests waiver of the Board's procedures for offers of financial assistance (OFA) at 49 C.F.R. § 1152.27 and an exemption from the corresponding OFA requirements under 49 U.S.C. § 10904. (Pet. 7.)

Pan Am's request for waiver of the OFA requirements will be granted. MBR does not oppose this request. (See Reply 4-6.) Moreover, if Pan Am prevails in its adverse discontinuance application, Pan Am would be responsible for providing rail service over the line, obviating the need for the OFA process.

Exemption Criteria. As indicated, Pan Am seeks exemptions from the following statutory provisions corresponding to Board regulations previously discussed: 49 U.S.C. § 10903(c)(2) (SDMs); § 10903(a)(3)(B) (Posting); and § 10904 (OFAs).<sup>10</sup> The Board will grant these related exemptions because the application of these provisions of the Interstate Commerce Act is not necessary here to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. Rather, these exemptions would provide Pan Am with a reasonable opportunity to make its case that there is no overriding present or future need for MBR's continued service on the Line. The exemptions would promote the RTP by eliminating unnecessary procedures, and thus would expedite regulatory decisions (§ 10101(2)) and foster sound economic conditions in transportation (§ 10101(5)). Other aspects of the RTP would not be adversely affected. Further, application of the statutory provisions we are exempting here is not necessary to protect shippers from an abuse of market power because Pan Am would be required to provide rail service even if adverse discontinuance authority as to MBR's trackage rights is granted.

It is ordered:

1. The petition for waivers and exemptions is granted in part and denied in part as discussed above.
2. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.

---

<sup>10</sup> Pan Am also seeks exemption from § 10903(a)(3)(C), but as discussed above, the Board is denying that request for exemption.